

ARKANSAS SUPREME COURT

No. CR 06-188

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered February 1, 2007

ROBERTO D. CABRAL
A/K/A ROBERTO DACO CABRAL
Appellant

APPEAL FROM THE CIRCUIT COURT
OF BENTON COUNTY, CR 2000-954,
HON. TOMMY J. KEITH, JUDGE

v.

STATE OF ARKANSAS
Appellee

AFFIRMED.

PER CURIAM

Roberto D. Cabral, who is also known as Roberto Daco Cabral, was charged with capital murder but was found guilty by a jury of first-degree murder. He received a sentence of forty years' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed. *Cabral v. State*, CACR 02-58 (Ark. App. Jan. 29, 2003). Subsequently, appellant timely filed a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

On appeal, appellant maintains that trial counsel rendered ineffective assistance. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The charge filed against appellant stemmed from an incident at his home in which his wife suffered a gunshot wound to her head and later died. When appellant initially contacted 9-1-1, he claimed that she shot herself. Over the course of several interviews, beginning the night of the incident, appellant changed his version of the facts related to his wife's death. Eventually, appellant was charged with capital murder.

As his first sub-point on appeal, appellant argues that trial counsel was ineffective for failing to object to the introduction of certain firearms during the trial. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that this deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent counsel's errors. *Greene, supra*. A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (*per curiam*). Allegations without factual substantiation are insufficient to overcome the presumption that counsel was effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003).

Appellant's argument that counsel was ineffective for not objecting to the relevancy of the firearms other than the murder weapon is premised on his assertion that introduction of the firearms into evidence "created an improper image of the appellant and served no purpose except to inflame

the jury.” Relevant evidence is defined under Ark. R. Evid. 401 as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

Here, the police confiscated six firearms from appellant’s home. Appellant informed police the night of the incident that, as he was leaving the house, he removed one handgun from the bedroom because he feared that his wife would kill herself, although five other firearms remained in the house. The police recovered that handgun from his vehicle in the garage. He also stated his desire to kill himself if his wife died, causing one of the officers to remove a sub-machine gun-style assault weapon from a wall mounting and to secure all the firearms from appellant’s reach.¹ Another handgun, the murder weapon, was retrieved from under the bed at appellant’s direction. Both of the handguns were fully loaded. The police also located and secured three additional handguns during a search of the house.

At trial, the State introduced all six firearms, which included the murder weapon, a Taurus 9 mm chrome handgun. During cross-examination by trial counsel, Officer Miller admitted that four of the five handguns and the assault weapon introduced into evidence had no connection to the victim’s murder. Appellant stated in each of his interviews that were introduced into evidence that he liked to shoot guns and shot a gun several times the night of the murder, which occurred on the Fourth of July. Other witnesses at trial testified that at various times, appellant held one of the guns to the victim’s head and to his own head, and that a gun was discharged inside the home in at least two other incidents.²

¹Shortly after his wife’s death, appellant appeared to have attempted suicide by ingesting a large number of Tylenol PM pills and other drugs, and was briefly hospitalized.

²Monica Lopez, a woman with whom appellant had a romantic relationship, testified that one time the victim called her house looking for appellant. The victim threatened to kill herself

Each firearm introduced at trial related to statements made by appellant and the circumstances surrounding his wife's murder. While introduction of the four handguns not used in the crime and the assault weapon was cumulative to the testimony of witnesses at trial to prove that guns were in appellant's home, introduction of the weapons was no more prejudicial than the statements appellant made at various times about liking guns and shooting guns often, including at least three times the night of the murder. Moreover, appellant's statement that he removed one handgun from the house because he was afraid the victim would commit suicide, while leaving four other handguns and the assault weapon inside the house, goes to the credibility of his statements made to the police.

To overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene, supra*. Appellant has failed to show how the introduction of the guns resulted in prejudice to the defense and failed to show a basis for the court's granting an objection to introduction of the firearms. Without factual substantiation of appellant's arguments, there was no basis to grant postconviction relief. *Jackson, supra*.

Further, trial counsel's decision not to object to introduction of the firearms may well have been a matter of trial strategy. *See Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for finding of ineffective assistance of counsel. *Noel,*

and then discharged a gun. In another incident, Cynthia Manjarres, the victim's younger sister, testified that during an argument between appellant and the victim, the two went into the bedroom. While in the bedroom and still arguing, a gun was fired twice. Appellant and victim then exited the bedroom.

supra. Counsel's actions did not satisfy either prong of *Strickland* and did not rise to the level of ineffective assistance of counsel. As a result, we cannot say the trial court's findings were erroneous on this point.

As part of this sub-point, and the second sub-point in his argument, appellant maintains that the trial court erred by denying his Rule 37.1 petition without a hearing. This court has recognized that the trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders, supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.* Here, the trial court made findings from the record that supported its decision to deny appellant's petition.

In appellant's second sub-point, he maintains that trial counsel erred when he failed to move for a directed verdict on the lesser-included offenses of first-degree and second-degree murder, thus preventing appellate review of substantial evidence to support the lesser-included offenses. On direct appeal, the court of appeals noted that it was unable to review the sufficiency of the evidence to support the conviction of first-degree murder as the issue had not been preserved for appeal. Nevertheless, the court of appeals stated in its opinion that "even if [it] were able to reach the merits of appellant's argument [regarding the lesser-included offense of first-degree murder, it] would affirm because there is substantial evidence to support the conviction." While the court of appeals did not address the issue, the court's comment supports the trial court's conclusion that appellant

failed to show that the failure to seek a directed verdict amounted to ineffective assistance of counsel.

As to the lesser-included offense of second-degree murder, appellant does not directly address this particular crime or the elements of the crime in his argument.³ Appellant admitted in his later interviews introduced at trial that he wrestled the gun away from the victim and the gun was in his hand when it was fired, striking his wife in the back of her skull. Prior to the gunshot, appellant and the victim were engaged in a heated argument over appellant's leaving the house, whether to work out at the gym or spend time with his mistress. The medical examiner, Dr. Charles Kokes, testified that there were fresh bruises on the victim's body which may have been the result of an altercation preceding the victim's death. Older bruises found on the victim's body may have indicated prior domestic abuse. Also, gunshot residue was found on one of appellant's hands, but not on the victim, leading to the conclusion that the victim was shot from a distance of at least three feet, and not at close range.

Appellant has failed to show a basis for granting a directed verdict on the charge of second-degree murder. Also, appellant failed to show how he suffered prejudice as a result of trial counsel's action, especially in light of the fact that he was found guilty of first-degree murder, which requires a showing of purposely causing the death of another, and entails proof of a more exacting *mens rea*. We cannot say that the trial court erred when it rejected this argument in appellant's Rule 37.1 petition.

³Pursuant to Ark. Code Ann. §5-10-103(a)(Repl. 2006):

(a) A person commits murder in the second degree if:

- (1) The person knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or
- (2) With the purpose of causing serious physical injury to another person, the person causes the death of any person.

Appellant's third sub-point is that trial counsel was ineffective in that counsel failed to obtain a ruling on the State's motion in limine to allow Rosa Flores' testimony, and failed to renew his objection to her testimony at trial. Ms. Flores was the victim's aunt who lived in Los Angeles. Approximately nine days before her death, the victim contacted Ms. Flores and asked to move to California and live with Ms. Flores. The victim cited her fear of appellant, related to domestic violence, and appellant's guns as the reason for wanting to leave. At trial, the State argued to the court that her statements were admissible under Ark. R. Evid. 803(3), an exception to hearsay, being a statement of an unavailable declarant's then-existing state of mind.

Appellant argues that Ms. Flores' testimony is inadmissible as the victim's mental or emotional condition is "purely subjective and irrelevant to the crime with which the defendant is charged." Appellant cites *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987), and *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999), in support of these propositions.

At the hearing on the State's motion in limine, the trial court determined that it would reserve its ruling until hearing the context of the testimony during the trial. As a result, trial counsel was unable to obtain a pre-trial ruling from the court. Based on the court's decision, appellant has no factual basis to argue that trial counsel rendered ineffective assistance of counsel.

During the trial, trial counsel did not object to Ms. Flores' testimony. However, appellant failed to state a basis for which the trial court would have sustained an objection to her testimony. In *Marx*, the defendant attempted to bring in testimony by a third party as to the *defendant's* mental condition in support for his defense of duress. The facts and holding of *Marx* are inapposite as to the use of Rule 803(3) in the present case as the defense of duress requires objective scrutiny, which is not required in the Rule itself. Similarly, invocation of Rule 803(3) does not require the proffered

testimony to support an essential element of the crime for which a defendant is charged. The second case cited by appellant, *Sasser*, does not address Rule 803(3) at all.

Instead, this court has long held that Rule 803(3) allows testimony of a victim's fear for his or her life prior to being murdered. *Vasquez v. State*, 287 Ark. 468 S.W.2d 411 (1986), quoting *Mackey v. State*, 279 Ark. 307, 651 S.W.2d 82 (1983). Arkansas Court of Appeals rulings have also allowed such testimony. *E.g. Smith v. State*, 33 Ark. App. 37, 801 S.W.2d 655 (1990).

Appellant has failed to show a factual or legal basis for granting an objection to Ms. Flores' testimony, and failed to show how he suffered prejudice as a result of trial counsel's action. While relevancy is the threshold issue in any ruling on the admissibility of evidence, appellant here failed to demonstrate that the victim's fear of appellant was irrelevant to circumstances surrounding her death.

Appellant's final sub-point alleges that trial counsel provided ineffective assistance by failing to object to the relevancy of Cynthia Manjarres' testimony, including testimony of an incident wherein appellant held a gun to the victim's head and then to his own head. Appellant contends that any arguments between the victim and appellant witnessed by Ms. Manjarres prior to the murder are unrelated to the crime and serve only to inflame the jury by giving the impression that he was, and is, a violent person.

Trial counsel did not object to any testimony given by Ms. Manjarres. Nevertheless, the trial court explained to the jury during Ms. Manjarres' testimony that its purpose was to show motive, absence of mistake or accident, and not to prove that the prior incidents occurred on the day the victim was killed. The arguments between appellant and victim were relevant, at a minimum, to refute appellant's contention that the gun accidentally discharged or that the victim beat herself when

she was upset, or to substantiate her fear as expressed to her aunt.

Appellant failed to show a valid basis for which an objection to this testimony would be sustained. Appellant is not entitled to preclude relevant, factual testimony simply because it places appellant in a bad light. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra; Camargo, supra*. Further, appellant failed to show how he was prejudiced as a result of trial counsel's actions. The trial court did not err in denying appellant's petition on this point.

Affirmed.